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SENATE BILL 5018

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State of Washington                      60th Legislature                      2007 Regular Session

By Senators Jacobsen, Kline and Roach

Read first time 01/08/2007. Referred to Committee on Judiciary.

1            AN ACT Relating to guardianship roles; and amending RCW 11.88.010  
2 and 11.88.090.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4            **Sec. 1.** RCW 11.88.010 and 2005 c 236 s 3 are each amended to read  
5 as follows:

6            (1) The superior court of each county shall have power to appoint  
7 guardians for the persons and/or estates of incapacitated persons, and  
8 guardians for the estates of nonresidents of the state who have  
9 property in the county needing care and attention.

10            (a) For purposes of this chapter, a person may be deemed  
11 incapacitated as to person when the superior court determines the  
12 individual has a significant risk of personal harm based upon a  
13 demonstrated inability to adequately provide for nutrition, health,  
14 housing, or physical safety.

15            (b) For purposes of this chapter, a person may be deemed  
16 incapacitated as to the person's estate when the superior court  
17 determines the individual is at significant risk of financial harm  
18 based upon a demonstrated inability to adequately manage property or  
19 financial affairs.

1 (c) A determination of incapacity is a legal not a medical  
2 decision, based upon a demonstration of management insufficiencies over  
3 time in the area of person or estate. Age, eccentricity, poverty, or  
4 medical diagnosis alone shall not be sufficient to justify a finding of  
5 incapacity.

6 (d) A person may also be determined incapacitated if he or she is  
7 under the age of majority as defined in RCW 26.28.010.

8 (e) For purposes of giving informed consent for health care  
9 pursuant to RCW 7.70.050 and 7.70.065, an "incompetent" person is any  
10 person who is (i) incompetent by reason of mental illness,  
11 developmental disability, senility, habitual drunkenness, excessive use  
12 of drugs, or other mental incapacity, of either managing his or her  
13 property or caring for himself or herself, or both, or (ii)  
14 incapacitated as defined in (a), (b), or (d) of this subsection.

15 (f) For purposes of the terms "incompetent," "disabled," or "not  
16 legally competent," as those terms are used in the Revised Code of  
17 Washington to apply to persons incapacitated under this chapter, those  
18 terms shall be interpreted to mean "incapacitated" persons for purposes  
19 of this chapter.

20 (2) The superior court for each county shall have power to appoint  
21 limited guardians for the persons and estates, or either thereof, of  
22 incapacitated persons, who by reason of their incapacity have need for  
23 protection and assistance, but who are capable of managing some of  
24 their personal and financial affairs. After considering all evidence  
25 presented as a result of such investigation, the court shall impose, by  
26 order, only such specific limitations and restrictions on an  
27 incapacitated person to be placed under a limited guardianship as the  
28 court finds necessary for such person's protection and assistance. A  
29 person shall not be presumed to be incapacitated nor shall a person  
30 lose any legal rights or suffer any legal disabilities as the result of  
31 being placed under a limited guardianship, except as to those rights  
32 and disabilities specifically set forth in the court order establishing  
33 such a limited guardianship. In addition, the court order shall state  
34 the period of time for which it shall be applicable.

35 (3) Venue for petitions for guardianship or limited guardianship  
36 shall lie in the county wherein the alleged incapacitated person is  
37 domiciled, or if such person resides in a facility supported in whole  
38 or in part by local, state, or federal funding sources, in either the

1 county where the facility is located, the county of domicile prior to  
2 residence in the supported facility, or the county where a parent or  
3 spouse of the alleged incapacitated person is domiciled.

4 If the alleged incapacitated person's residency has changed within  
5 one year of the filing of the petition, any interested person may move  
6 for a change of venue for any proceedings seeking the appointment of a  
7 guardian or a limited guardian under this chapter to the county of the  
8 alleged incapacitated person's last place of residence of one year or  
9 more. The motion shall be granted when it appears to the court that  
10 such venue would be in the best interests of the alleged incapacitated  
11 person and would promote more complete consideration of all relevant  
12 matters.

13 (4) Under RCW 11.94.010, a principal may nominate, by a durable  
14 power of attorney, the guardian or limited guardian of his or her  
15 estate or person for consideration by the court if guardianship  
16 proceedings for the principal's person or estate are thereafter  
17 commenced. The court shall make its appointment in accordance with the  
18 principal's most recent nomination in a durable power of attorney  
19 except for good cause or disqualification.

20 (5) Imposition of a guardianship for an incapacitated person shall  
21 not result in the loss of the right to vote unless the court determines  
22 that the person is incompetent for purposes of rationally exercising  
23 the franchise in that the individual lacks the capacity to understand  
24 the nature and effect of voting such that she or he cannot make an  
25 individual choice. The court order establishing guardianship shall  
26 specify whether or not the individual retains voting rights. When a  
27 court determines that the person is incompetent for the purpose of  
28 rationally exercising the right to vote, the court shall notify the  
29 appropriate county auditor.

30 (6) A professional guardian shall not serve as both a guardian or  
31 limited guardian and an attorney or guardian ad litem for the same  
32 incapacitated person.

33 **Sec. 2.** RCW 11.88.090 and 2000 c 124 s 1 are each amended to read  
34 as follows:

35 (1) Nothing contained in RCW 11.88.080 through 11.88.120, 11.92.010  
36 through 11.92.040, 11.92.060 through 11.92.120, 11.92.170, and  
37 11.92.180 shall affect or impair the power of any court to appoint a

1 guardian ad litem to defend the interests of any incapacitated person  
2 interested in any suit or matter pending therein, or to commence and  
3 prosecute any suit in his or her behalf.

4 (2) Prior to the appointment of a guardian or a limited guardian,  
5 whenever it appears that the incapacitated person or incapacitated  
6 person's estate could benefit from mediation and such mediation would  
7 likely result in overall reduced costs to the estate, upon the motion  
8 of the alleged incapacitated person or the guardian ad litem, or  
9 subsequent to such appointment, whenever it appears that the  
10 incapacitated person or incapacitated person's estate could benefit  
11 from mediation and such mediation would likely result in overall  
12 reduced costs to the estate, upon the motion of any interested person,  
13 the court may:

14 (a) Require any party or other person subject to the jurisdiction  
15 of the court to participate in mediation;

16 (b) Establish the terms of the mediation; and

17 (c) Allocate the cost of the mediation pursuant to RCW  
18 (~~11.96.140~~) 11.96A.150.

19 (3) Upon receipt of a petition for appointment of guardian or  
20 limited guardian, except as provided herein, the court shall appoint a  
21 guardian ad litem to represent the best interests of the alleged  
22 incapacitated person, who shall be a person found or known by the court  
23 to:

24 (a) Be free of influence from anyone interested in the result of  
25 the proceeding; (~~and~~)

26 (b) Have the requisite knowledge, training, or expertise to perform  
27 the duties required by this section; and

28 (c) Not be a professional guardian seeking appointment as a  
29 guardian or limited guardian for the same alleged incapacitated person.

30 The guardian ad litem shall within five days of receipt of notice  
31 of appointment file with the court and serve, either personally or by  
32 certified mail with return receipt, each party with a statement  
33 including: His or her training relating to the duties as a guardian ad  
34 litem; his or her criminal history as defined in RCW 9.94A.030 for the  
35 period covering ten years prior to the appointment; his or her hourly  
36 rate, if compensated; whether the guardian ad litem has had any contact  
37 with a party to the proceeding prior to his or her appointment; and  
38 whether he or she has an apparent conflict of interest. Within three

1 days of the later of the actual service or filing of the guardian ad  
2 litem's statement, any party may set a hearing and file and serve a  
3 motion for an order to show cause why the guardian ad litem should not  
4 be removed for one of the following three reasons: (i) Lack of  
5 expertise necessary for the proceeding; (ii) an hourly rate higher than  
6 what is reasonable for the particular proceeding; or (iii) a conflict  
7 of interest. Notice of the hearing shall be provided to the guardian  
8 ad litem and all parties. If, after a hearing, the court enters an  
9 order replacing the guardian ad litem, findings shall be included,  
10 expressly stating the reasons for the removal. If the guardian ad  
11 litem is not removed, the court has the authority to assess to the  
12 moving party, attorneys' fees and costs related to the motion. The  
13 court shall assess attorneys' fees and costs for frivolous motions.

14 No guardian ad litem need be appointed when a parent is petitioning  
15 for a guardian or a limited guardian to be appointed for his or her  
16 minor child and the minority of the child, as defined by RCW 11.92.010,  
17 is the sole basis of the petition. The order appointing the guardian  
18 ad litem shall recite the duties set forth in subsection (5) of this  
19 section. The appointment of a guardian ad litem shall have no effect  
20 on the legal competency of the alleged incapacitated person and shall  
21 not overcome the presumption of competency or full legal and civil  
22 rights of the alleged incapacitated person.

23 (4)(a) The superior court of each county shall develop and maintain  
24 a registry of persons who are willing and qualified to serve as  
25 guardians ad litem in guardianship matters. The court shall choose as  
26 guardian ad litem a person whose name appears on the registry in a  
27 system of consistent rotation, except in extraordinary circumstances  
28 such as the need for particular expertise. The court shall develop  
29 procedures for periodic review of the persons on the registry and for  
30 probation, suspension, or removal of persons on the registry for  
31 failure to perform properly their duties as guardian ad litem. In the  
32 event the court does not select the person next on the list, it shall  
33 include in the order of appointment a written reason for its decision.

34 (b) To be eligible for the registry a person shall:

35 (i) Present a written statement outlining his or her background and  
36 qualifications. The background statement shall include, but is not  
37 limited to, the following information:

38 (A) Level of formal education;

- 1 (B) Training related to the guardian ad litem's duties;  
2 (C) Number of years' experience as a guardian ad litem;  
3 (D) Number of appointments as a guardian ad litem and the county or  
4 counties of appointment;  
5 (E) Criminal history, as defined in RCW 9.94A.030; and  
6 (F) Evidence of the person's knowledge, training, and experience in  
7 each of the following: Needs of impaired elderly people, physical  
8 disabilities, mental illness, developmental disabilities, and other  
9 areas relevant to the needs of incapacitated persons, legal procedure,  
10 and the requirements of chapters 11.88 and 11.92 RCW.

11 The written statement of qualifications shall include the names of  
12 any counties in which the person was removed from a guardian ad litem  
13 registry pursuant to a grievance action, and the name of the court and  
14 the cause number of any case in which the court has removed the person  
15 for cause; and

16 (ii) Complete the training as described in (e) of this subsection.  
17 The training is not applicable to guardians ad litem appointed pursuant  
18 to special proceeding Rule 98.16W.

19 (c) Superior court shall remove any person from the guardian ad  
20 litem registry who misrepresents his or her qualifications pursuant to  
21 a grievance procedure established by the court.

22 (d) The background and qualification information shall be updated  
23 annually.

24 (e) The department of social and health services shall convene an  
25 advisory group to develop a model guardian ad litem training program  
26 and shall update the program biennially. The advisory group shall  
27 consist of representatives from consumer, advocacy, and professional  
28 groups knowledgeable in developmental disabilities, neurological  
29 impairment, physical disabilities, mental illness, domestic violence,  
30 aging, legal, court administration, the Washington state bar  
31 association, and other interested parties.

32 (f) The superior court shall require utilization of the model  
33 program developed by the advisory group as described in (e) of this  
34 subsection, to assure that candidates applying for registration as a  
35 qualified guardian ad litem shall have satisfactorily completed  
36 training to attain these essential minimum qualifications to act as  
37 guardian ad litem.

1 (5) The guardian ad litem appointed pursuant to this section shall  
2 have the following duties:

3 (a) To meet and consult with the alleged incapacitated person as  
4 soon as practicable following appointment and explain, in language  
5 which such person can reasonably be expected to understand, the  
6 substance of the petition, the nature of the resultant proceedings, the  
7 person's right to contest the petition, the identification of the  
8 proposed guardian or limited guardian, the right to a jury trial on the  
9 issue of his or her alleged incapacity, the right to independent legal  
10 counsel as provided by RCW 11.88.045, and the right to be present in  
11 court at the hearing on the petition;

12 (b) To obtain a written report according to RCW 11.88.045; and such  
13 other written or oral reports from other qualified professionals as are  
14 necessary to permit the guardian ad litem to complete the report  
15 required by this section;

16 (c) To meet with the person whose appointment is sought as guardian  
17 or limited guardian and ascertain:

18 (i) The proposed guardian's knowledge of the duties, requirements,  
19 and limitations of a guardian; and

20 (ii) The steps the proposed guardian intends to take or has taken  
21 to identify and meet the needs of the alleged incapacitated person;

22 (d) To consult as necessary to complete the investigation and  
23 report required by this section with those known relatives, friends, or  
24 other persons the guardian ad litem determines have had a significant,  
25 continuing interest in the welfare of the alleged incapacitated person;

26 (e) To investigate alternate arrangements made, or which might be  
27 created, by or on behalf of the alleged incapacitated person, such as  
28 revocable or irrevocable trusts, durable powers of attorney, or blocked  
29 accounts; whether good cause exists for any such arrangements to be  
30 discontinued; and why such arrangements should not be continued or  
31 created in lieu of a guardianship;

32 (f) To provide the court with a written report which shall include  
33 the following:

34 (i) A description of the nature, cause, and degree of incapacity,  
35 and the basis upon which this judgment was made;

36 (ii) A description of the needs of the incapacitated person for  
37 care and treatment, the probable residential requirements of the

1 alleged incapacitated person and the basis upon which these findings  
2 were made;

3 (iii) An evaluation of the appropriateness of the guardian or  
4 limited guardian whose appointment is sought and a description of the  
5 steps the proposed guardian has taken or intends to take to identify  
6 and meet current and emerging needs of the incapacitated person;

7 (iv) A description of any alternative arrangements previously made  
8 by the alleged incapacitated person or which could be made, and whether  
9 and to what extent such alternatives should be used in lieu of a  
10 guardianship, and if the guardian ad litem is recommending  
11 discontinuation of any such arrangements, specific findings as to why  
12 such arrangements are contrary to the best interest of the alleged  
13 incapacitated person;

14 (v) A description of the abilities of the alleged incapacitated  
15 person and a recommendation as to whether a guardian or limited  
16 guardian should be appointed. If appointment of a limited guardian is  
17 recommended, the guardian ad litem shall recommend the specific areas  
18 of authority the limited guardian should have and the limitations and  
19 disabilities to be placed on the incapacitated person;

20 (vi) An evaluation of the person's mental ability to rationally  
21 exercise the right to vote and the basis upon which the evaluation is  
22 made;

23 (vii) Any expression of approval or disapproval made by the alleged  
24 incapacitated person concerning the proposed guardian or limited  
25 guardian or guardianship or limited guardianship;

26 (viii) Identification of persons with significant interest in the  
27 welfare of the alleged incapacitated person who should be advised of  
28 their right to request special notice of proceedings pursuant to RCW  
29 11.92.150; and

30 (ix) Unless independent counsel has appeared for the alleged  
31 incapacitated person, an explanation of how the alleged incapacitated  
32 person responded to the advice of the right to jury trial, to  
33 independent counsel and to be present at the hearing on the petition.

34 Within forty-five days after notice of commencement of the  
35 guardianship proceeding has been served upon the guardian ad litem, and  
36 at least fifteen days before the hearing on the petition, unless an  
37 extension or reduction of time has been granted by the court for good  
38 cause, the guardian ad litem shall file its report and send a copy to

1 the alleged incapacitated person and his or her counsel, spouse, all  
2 children not residing with a notified person, those persons described  
3 in (f)(viii) of this subsection, and persons who have filed a request  
4 for special notice pursuant to RCW 11.92.150. If the guardian ad litem  
5 needs additional time to finalize his or her report, then the guardian  
6 ad litem shall petition the court for a postponement of the hearing or,  
7 with the consent of all other parties, an extension or reduction of  
8 time for filing the report. If the hearing does not occur within sixty  
9 days of filing the petition, then upon the two-month anniversary of  
10 filing the petition and on or before the same day of each following  
11 month until the hearing, the guardian ad litem shall file interim  
12 reports summarizing his or her activities on the proceeding during that  
13 time period as well as fees and costs incurred;

14 (g) To advise the court of the need for appointment of counsel for  
15 the alleged incapacitated person within five court days after the  
16 meeting described in (a) of this subsection unless (i) counsel has  
17 appeared, (ii) the alleged incapacitated person affirmatively  
18 communicated a wish not to be represented by counsel after being  
19 advised of the right to representation and of the conditions under  
20 which court-provided counsel may be available, or (iii) the alleged  
21 incapacitated person was unable to communicate at all on the subject,  
22 and the guardian ad litem is satisfied that the alleged incapacitated  
23 person does not affirmatively desire to be represented by counsel.

24 (6) If the petition is brought by an interested person or entity  
25 requesting the appointment of some other qualified person or entity and  
26 a prospective guardian or limited guardian cannot be found, the court  
27 shall order the guardian ad litem to investigate the availability of a  
28 possible guardian or limited guardian and to include the findings in a  
29 report to the court pursuant to subsection (5)(f) of this section. In  
30 no case shall the court order the guardian ad litem to also serve as a  
31 professional guardian for the same client.

32 (7) The parties to the proceeding may file responses to the  
33 guardian ad litem report with the court and deliver such responses to  
34 the other parties and the guardian ad litem at any time up to the  
35 second day prior to the hearing. If a guardian ad litem fails to file  
36 his or her report in a timely manner, the hearing shall be continued to  
37 give the court and the parties at least fifteen days before the hearing  
38 to review the report. At any time during the proceeding upon motion of

1 any party or on the court's own motion, the court may remove the  
2 guardian ad litem for failure to perform his or her duties as specified  
3 in this chapter, provided that the guardian ad litem shall have five  
4 days' notice of any motion to remove before the court enters such  
5 order. In addition, the court in its discretion may reduce a guardian  
6 ad litem's fee for failure to carry out his or her duties.

7 (8) The court appointed guardian ad litem shall have the authority,  
8 in the event that the alleged incapacitated person is in need of  
9 emergency life-saving medical services, and is unable to consent to  
10 such medical services due to incapacity pending the hearing on the  
11 petition to give consent for such emergency life-saving medical  
12 services on behalf of the alleged incapacitated person.

13 (9) The court-appointed guardian ad litem shall have the authority  
14 to move for temporary relief under chapter 7.40 RCW to protect the  
15 alleged incapacitated person from abuse, neglect, abandonment, or  
16 exploitation, as those terms are defined in RCW 74.34.020, or to  
17 address any other emergency needs of the alleged incapacitated person.  
18 Any alternative arrangement executed before filing the petition for  
19 guardianship shall remain effective unless the court grants the relief  
20 requested under chapter 7.40 RCW, or unless, following notice and a  
21 hearing at which all parties directly affected by the arrangement are  
22 present, the court finds that the alternative arrangement should not  
23 remain effective.

24 (10) The guardian ad litem shall receive a fee determined by the  
25 court. The fee shall be charged to the alleged incapacitated person  
26 unless the court finds that such payment would result in substantial  
27 hardship upon such person, in which case the county shall be  
28 responsible for such costs: PROVIDED, That the court may charge such  
29 fee to the petitioner, the alleged incapacitated person, or any person  
30 who has appeared in the action; or may allocate the fee, as it deems  
31 just. If the petition is found to be frivolous or not brought in good  
32 faith, the guardian ad litem fee shall be charged to the petitioner.  
33 The court shall not be required to provide for the payment of a fee to  
34 any salaried employee of a public agency.

35 (11) Upon the presentation of the guardian ad litem report and the  
36 entry of an order either dismissing the petition for appointment of  
37 guardian or limited guardian or appointing a guardian or limited  
38 guardian, the guardian ad litem shall be dismissed and shall have no

1 further duties or obligations unless otherwise ordered by the court.  
2 If the court orders the guardian ad litem to perform further duties or  
3 obligations, they shall not be performed at county expense.

4 (12) The guardian ad litem shall appear in person at all hearings  
5 on the petition unless all parties provide a written waiver of the  
6 requirement to appear.

7 (13) At any hearing the court may consider whether any person who  
8 makes decisions regarding the alleged incapacitated person or estate  
9 has breached a statutory or fiduciary duty.

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